

Failure to Train Employees--Now a Federal Crime

The Olympic Pipeline prosecution should be a wake-up call to industry. Industrial "accidents" often result in the initiation of a criminal investigation.

by Jane F. Barrett

On Dec. 11, 2002, four defendants, Ronald Brentson, Frank Hopf, Jr., Equilon Pipeline Company, LLC, and Olympic Pipeline Company pleaded guilty in federal court to committing a federal crime--the failure to keep records documenting that employees of the companies received training required by regulations promulgated pursuant to the Hazardous Liquid Pipeline Safety Act (HLPISA). The startling reality is that there are numerous federal environmental and safety statutes that have similar criminal provisions.

The Olympic Pipeline case began after a pipeline explosion on June 10, 1999, killed three people in Bellingham, Wash. After a lengthy criminal investigation, a federal grand jury returned an indictment charging the defendants with knowingly and willfully violating "minimum safety standards" relating to general regulatory requirements regarding pipeline operation, employee training, operation and testing of safety devices, valve maintenance, and the violations of procedure manuals relating to operations, maintenance, and emergencies. These regulatory requirements violated the criminal provisions of the HLPISA.

Like some of the other environmental statutes, the HLPISA criminal provisions have a troubling phrase bringing within the ambit conduct that violates regulatory requirements most people do not realize can put them at risk of criminal prosecution.

The Clean Air Act (CAA) has much broader criminal provisions than either the Clean Water Act or the Resource Conservation Recovery Act and prohibits the knowing violation of numerous regulatory requirements. Examples of CAA regulations that impose training, maintenance, reporting, and recordkeeping requirements that are enforceable under the criminal provisions of the CAA follow.

- 40 C.F.R. part 68--Chemical Accident Prevention/Accidental Release Regulations require an owner/operator of a stationary source that has more than a specified threshold quantity of a listed chemical in a process (chemicals subject to 40 C.F.R. §68.130 include ammonia, hydrogen sulfide, nitrogen oxide, sulfur

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dioxide, and toluene) to implement accident prevention programs, including training for employees working with listed hazardous chemicals, and to develop emergency response plans, including training programs for employees in relevant procedures. For example,

Section 68.54 (program 2 processes) and section 68.71 (program 3 processes) provide that owners/operators must ensure employees "operating a process" are trained and competent in specified operating procedures (including start-up, normal operation, normal shutdown, temporary operations, and emergency shutdown and operations) before beginning work and are provided with refresher training administered periodically thereafter. For certain processes, training also must include safety and health considerations, any special or unique hazards, and safe work practices applicable to the specific job tasks.

Section 68.95 requires the owner/operator to develop an emergency response program to protect the public health and environment. As part of that program, the owner/operator must ensure all employees are trained in "relevant procedures," including relating to informing the public and response agencies about accidental releases, documentation of necessary medical treatment, and procedures and measures for emergency response.

Subpart G requires preparation and submission of a Risk Management Plan (RMP). Specifically, §68.175 (program 3 processes) requires that the RMP include information regarding training programs and equipment maintenance and inspections. Section 68.200 requires the owner/operator to maintain records regarding the RMP for five years.

- All of the National Emission Standards for Hazardous Air Pollutants (NESHAPs) requirements are criminally enforceable. Examples of NESHAPs requirements relating to maintenance, reporting, and training include:

General Provisions/Maintenance: Sources, including associated control equipment, must be maintained and operated in "a manner consistent with good air pollution control practice for minimizing emissions." Whether acceptable procedures are being implemented will be determined based on "information available to [EPA] which may include, but is not limited to, monitoring results, review of operating and maintenance procedures, and inspection of the source." 40 C.F.R. §61.12(c).

Reporting/Recordkeeping: The general NESHAP provisions, as well as the regulations specific to various hazardous air pollutants and operations, contain numerous, detailed reporting and recordkeeping requirements. Examples include: §61.10(a) (general initial report); §61.14 (general monitoring and associated recordkeeping requirements); §61.153 (asbestos NESHAP reporting); §61.247 (equipment leaks NESHAP reporting); §61.274-275 (benzene storage vessel NESHAP reporting--initial and periodic); §61.356 (benzene waste operations recordkeeping); and §61.357 (benzene waste operations NESHAP reporting--initial and periodic).

Hazardous Waste Combustors Source Category NESHAP - Training: 40 C.F.R. §63.1206 provides that training programs must be established for all categories of personnel whose activities may reasonably be expected to directly affect emissions of hazardous air pollutants from the source.

Criminal Provisions in the OSH Act

The Occupational Safety and Health Act contains only misdemeanor criminal provisions and federal OSH Act prosecutions are rare, although many states have delegated authority under the act and impose more stringent requirements, as well as felony enforcement provisions. Nonetheless, the federal misdemeanor provisions in the case of a violation that causes the death of an employee are very broad and include the following:

29 U.S.C. §666(e) provides that the willful violation by an employer of any standard, rule, or order promulgated pursuant to section 655 of this title (. . .), *or of any regulations prescribed pursuant to the Act*, that causes the death of any employee is a misdemeanor.

The OSH Act regulations contain numerous training and reporting requirements, many of which have very narrow and specific application. The following are examples of broader regulatory requirements related to training that are enforceable under the criminal provisions of the statute:

- 29 C.F.R. §1910.119 imposes process safety management requirements or preventing or minimizing the consequences of catastrophic releases of toxic, reactive, flammable, or explosive chemicals. This regulation was promulgated pursuant to §304 of the Clean Air Act Amendments of 1990, which is now codified at 29 U.S.C. §655; however, it is criminally enforceable under the OSH Act. In addition to several other requirements, employees must receive training regarding an overview of the process and standard operating procedures, which must include specified elements, before beginning work, and refresher training every three years (or more, if necessary). Employers must ensure their employees received and understood the training and are required to keep records of the training and certification.
- 29 C.F.R. §1910.120 applies to cleanup operations required by a government body, corrective actions involving cleanup operations at sites covered by RCRA, voluntary cleanup operations, operations involving hazardous wastes conducted at TSD facilities, emergency response operations for hazardous substance releases, or threats. Subsection (e) requires that "all employees working on site . . . exposed to hazardous substances, health hazards, or safety hazards and their supervisors and management . . . receive training regarding hazards on the site, use of protective equipment, work practices," etc. Employees must receive initial training before beginning work and annual refresher training.
- 29 C.F.R. §1910.38 lists the requirements for all Emergency Action Plans required under OSHA standards. In part, it provides that employers must inform employees about fire hazards related to materials and processes to which they are exposed and must designate and train employees to assist in emergency evacuation of employees.

- 29 C.F.R. §1910.1001(j)(7) provides that employers must implement a training program for employees who are exposed to asbestos at certain levels and ensure employee participation in the program. The regulation specifies a number of issues the training program should address, including health risks associated with asbestos exposure; the quantity, location, manner of use, release, and storage of asbestos; the types of operations which could result in asbestos exposure; and the specific procedures that have been implemented to protect employees from exposure to asbestos. Training must be provided before employees begin work and must be repeated at least annually thereafter. Employers must make written training materials available to employees at no cost and must provide all information relating to training programs to the assistant secretary and the director upon request.

Federal misdemeanor provisions in the case of a safety violation that causes the death of an employee are very broad. The Hazardous Materials Transportation Act also has broad criminal penalty provisions.

Hazmat Transportation Provisions

The Hazardous Materials Transportation Act (HMTA) is yet another statute that has very broad criminal penalty provisions. Section 5124 prohibits the willful violation of the statute or any regulation or order issued under it. Examples of training regulations that are criminally enforceable pursuant to 49 U.S.C. §5124 include:

- 49 U.S.C. §5107 requires hazmat employers to certify employees have received appropriate training (e.g., recognizing and handling hazardous materials) and have been tested on areas of responsibility. 49 C.F.R. §§ 172.700-172.704 describe training requirements for hazmat employees, including:
 - employers must ensure employees receive training before beginning work and at least once every three years thereafter;
 - training must address general awareness/familiarization with hazardous materials and safety regulations;
 - training must be "function-specific" (i.e., relevant to the actual tasks trainee is to perform);
 - employees must receive safety training (i.e., procedures for avoiding accidents, emergency response, etc.);
 - training must comply with OSHA, Department of Labor, and EPA Hazard Communication programs; and

employers must prepare and retain training records for three years.

- 49 C.F.R. §177.816 provides no carrier may transport or cause to be transported hazardous materials by motor vehicle unless each hazmat employee who will

operate a motor vehicle has been properly trained in each of the subjects enumerated in the regulation.

The Olympic Pipeline prosecution should be a wake-up call to industry. Industrial "accidents" often result in the initiation of a criminal investigation. The more serious the impact on people or the environment, the more scrutiny the unfortunate company will receive from law enforcement. It is thus critical that attention be paid now, before any incident occurs, to the training, recordkeeping, and maintenance requirements of the various environmental, health, and safety laws so that if the unthinkable happens, it can be established the conduct was accidental and not the result of criminal negligence or knowing conduct.

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